

# MIAMI BEACH

## City Commission Meeting

### ADDENDUM MATERIAL 1

City Hall, Commission Chambers, 3rd Floor, 1700 Convention Center Drive

February 24, 2016

Mayor Philip Levine  
Commissioner John Elizabeth Alemán  
Commissioner Ricky Arriola  
Commissioner Kristen Rosen Gonzalez  
Commissioner Michael Grieco  
Commissioner Joy Malakoff  
Commissioner Micky Steinberg

City Manager Jimmy L. Morales  
City Attorney Raul J. Aguila  
City Clerk Rafael E. Granada

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#### ATTENTION ALL LOBBYISTS

Chapter 2, Article VII, Division 3 of the City Code of Miami Beach entitled "Lobbyists" requires the registration of all lobbyists with the City Clerk prior to engaging in any lobbying activity with the City Commission, any City Board or Committee, or any personnel as defined in the subject Code sections. Copies of the City Code sections on lobbyists laws are available in the City Clerk's office. Questions regarding the provisions of the Ordinance should be directed to the Office of the City Attorney.

#### ADDENDUM AGENDA

#### R9 - New Business and Commission Requests

- R9C City Attorney's February 22, 2016, Request For An Opinion From The Florida Commission On Ethics Concerning Whether Mayor Levine Has A Voting Conflict On The Ordinance Seeking To Increase The Maximum Height And Reduce Setbacks In Sunset Harbour.  
(Sponsored by Commissioner Kristen Rosen Gonzalez)

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<sup>1</sup> The sponsor of the addendum agenda item deems that such item either constitutes a public emergency affecting life, health, property, or public safety and should be considered immediately; or does not constitute a public emergency, but should be considered immediately. See Miami Beach Code Sec. 2-12 (c)(3).

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# MIAMI BEACH

OFFICE OF THE MAYOR AND COMMISSION

## MEMORANDUM

TO: Jimmy Morales, City Manager

FROM: Kristen Rosen Gonzalez, Commissioner

Date: February 23, 2016

SUBJECT: **City Attorney's February 22, 2016, Request for an Opinion from The Florida Commission on Ethics Concerning Whether Mayor Levine has a Voting Conflict on the Ordinance Seeking to Increase the Maximum Height and Reduce Setbacks in Sunset Harbour**

I would like to discuss the City Attorney's February 22, 2016 request for an opinion from the COE regarding whether Mayor Levine has a voting conflict on the Ordinance seeking to increase the maximum height and reduce setbacks in Sunset Harbour.

The reason I am adding this item to the agenda as an addendum is because the City's Attorney's letter was just sent on February 22, 2016, several days after the deadline for submitting agenda items passed. Also, the City Attorney has requested the COE to issue its opinion before February 29, 2016, and this is the last City Commission meeting before that deadline. Finally, and most importantly, material facts were omitted from the City Attorney's letter which are necessary for the COE to be aware of before they can issue accurate opinion. I have a legitimate interest, as does the rest of the City Commission, in the COE issuing an opinion based on all the facts before voting on an Ordinance that may benefit Mayor Levine.

I have reviewed the letter from the City Attorney to the COE. It states in part that "only one property owner meets the threshold 200+ square foot of property (via its assemblage ownership of seven (7) adjacent properties), leaving three (3) properties on the block facing Purdy Avenue which do not satisfy the 200 square foot threshold, and who would thus not qualify for the increased height and reduced setback requirements of the Ordinance," and that "The City's Mayor, Philip Levine, is one of these three (3) property owners... which lot is directly adjacent to the above-referenced (200+ square foot) property that is affected by the Ordinance."

The way the facts are described, it has the potential to confuse the COE into believing that Mayor Levine's property is automatically disqualified from receiving the benefits of the Ordinance, which is not the case.

The letter omits the material fact that Mayor Levine's property can be aggregated into the development. This is of vital importance because the developer seeking the height increase submitted the attached Declaration of Restrictive Covenants (which incorporates by reference a set of plans known as Sunset Harbour Architectural Concept Design February 11, 2016 for the development of the aggregated lots on the block) which explicitly provides that the floor area is restricted to what is shown on the plans "**unless additional land is incorporated into the Property described by the Declaration.**" This language is specifically designed not to exclude but rather to potentially include the lot in which Mayor Levine has an interest allowing greater floor area in the development.

Because Mayor Levine's property can be aggregated into the development, he benefits from the Ordinance and Declaration of Restrictive Covenants.

The City Attorney should send a supplemental letter to the COE clarifying that Mayor Levine's property is not automatically disqualified from receiving the benefits of the Ordinance and Declaration of Restrictive Covenants because his property can be aggregated into the development.

Kristen Rosen Gonzalez

SUNSET HARBOR CD-2 ZONING

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING THE LAND DEVELOPMENT REGULATIONS OF THE CITY CODE, BY AMENDING CHAPTER 142, "ZONING DISTRICTS AND REGULATIONS," ARTICLE II, "DISTRICT REGULATIONS", DIVISION 5, "CD-2, COMMERCIAL, MEDIUM-INTENSITY DISTRICT," SECTION 142-306, "DEVELOPMENT REGULATIONS," BY AMENDING THE SETBACKS AND MAXIMUM PERMITTED HEIGHT AND NUMBER OF STORIES FOR MIXED-USE DEVELOPMENT IN THE SUNSET HARBOUR AREA; PROVIDING FOR CODIFICATION; REPEALER; SEVERABILITY, AND AN EFFECTIVE DATE.

WHEREAS, the City of Miami Beach has the authority to enact laws which promote the public health, safety and general welfare of its citizens; and

WHEREAS, the City of Miami Beach Land Development Regulations ("LDRs") provides for the regulation of land within the City; and

WHEREAS, the City seeks to encourage well-designed mixed-use projects on parcels fronting on southern Purdy Avenue and Dade Boulevard in the Sunset Harbour neighborhood

WHEREAS, the Planning Board, at its meeting dated XXXX XX, 2016, by a vote of X-X, recommended in favor of the Ordinance; and

WHEREAS, the amendments set forth below are necessary to accomplish the above objectives.

NOW THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA:

SECTION 1. That Chapter 142, "Zoning Districts and Regulations," Article II, "District Regulations," Division 5, "CD-2 Commercial, Medium Intensity District," of the Land Development Regulations of the Code of the City of Miami Beach, Florida is hereby amended as follows:

\* \* \*

Sec. 142-306. - Development regulations.

\* \* \*

(f) The height and setbacks of mixed-use buildings in the Sunset Harbour Neighborhood, generally bounded by Purdy Avenue, 20th Street, Alton Road and Dade Boulevard, shall be further governed as follows. Mixed-use buildings on lots with a platted frontage equal to or

greater than 200 feet with a lot line on Purdy Avenue south of 18<sup>th</sup> Street shall have a maximum height of 90 feet and nine (9) stories. Setbacks for the residential uses in mixed-use buildings with a platted frontage equal to or greater than 200 feet with a lot line on Purdy Avenue south of 18<sup>th</sup> Street shall follow Section 142-307, except that residential pedestal or tower floors shall have a fifteen (15) foot front setback, five (5) foot rear setback, and ten (10) foot interior side setbacks.

**SECTION 2. REPEALER.**

All ordinances or parts of ordinances and all section and parts of sections in conflict herewith be and the same are hereby repealed.

**SECTION 3. CODIFICATION.**

It is the intention of the City Commission, and it is hereby ordained that the provisions of this ordinance shall become and be made part of the Code of the City of Miami Beach as amended; that the sections of this ordinance may be renumbered or relettered to accomplish such intention; and that the word "ordinance" may be changed to "section" or other appropriate word.

**SECTION 4. SEVERABILITY.**

If any section, subsection, clause or provision of this Ordinance is held invalid, the remainder shall not be affected by such invalidity.

**SECTION 5. EFFECTIVE DATE.**

This Ordinance shall take effect ten days following adoption.

**PASSED and ADOPTED** this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
Philip Levine, Mayor

**ATTEST:**

\_\_\_\_\_  
Rafael E. Granado, City Clerk  
First Reading: September 2, 2015  
Second Reading: October 14, 2015

Verified by: \_\_\_\_\_  
Thomas R. Mooney, AICP  
Planning Director

Underline denotes new language  
~~Strikethrough~~ denotes deleted language

# MIAMI BEACH

City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, [www.miamibeachfl.gov](http://www.miamibeachfl.gov)

RAUL J. AGUILA, CITY ATTORNEY  
Tel: 305-673-7470, Fax: 305-673-7002

February 22, 2016

Virlindia Doss, Executive Director  
The Florida Commission on Ethics  
P. O. Drawer 15709  
Tallahassee, FL 32317-5709

Via E-Mail: [doss.virlindia@leg.state.fl.us](mailto:doss.virlindia@leg.state.fl.us)

## **RE: Request for CEO Opinion**

Dear Ms. Doss:

Pursuant to Florida Statute Section 112.322(3)(a), as City Attorney for the City of Miami Beach, I hereby request with the consent of and on behalf of Miami Beach Mayor Philip Levine, an opinion from the State of Florida Commission on Ethics concerning the applicability and interpretation of the Florida Ethics Code within the context of the following described facts<sup>1</sup>:

### **I. Factual Background**

At its March 9, 2016 meeting, the Miami Beach City Commission will be considering an ordinance amending the City's Land Use Regulations for the CD-2 Commercial Zoning District in the City's Sunset Harbour Neighborhood. The Sunset Harbour Neighborhood is a growing community which has undergone (and continues to undergo) public and private revitalization due to the increased demand for residential and commercial uses within the City<sup>2</sup>, and the subject zoning Ordinance is being proposed in further recognition of the public's demand for such increased residential uses in the area.

The Ordinance applies expressly to those properties within one square block of the Neighborhood which front Purdy Avenue by a minimum of 200 linear feet, and proposes to increase said properties' maximum height from 50 feet to 90 feet, and decrease minimum setbacks thereon. Although there are 10 properties on the subject block which directly face Purdy Avenue, only one property owner meets the threshold 200+ square feet of property (via its assemblage ownership of seven (7) adjacent properties), leaving three (3) properties on the block facing Purdy Avenue which do not satisfy the 200 square foot threshold, and who would thus not qualify for the increased height and reduced setback requirements of the Ordinance. The City's Mayor, Philip Levine, is one of these three (3) property owners, being owner/manager of Purdy Partners 1787 LLC, which entity owns a lot with 50 feet of frontage along Purdy, and which lot is directly adjacent to the above-referenced (200+ square foot) property that is affected by the Ordinance.

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<sup>1</sup> My Office has discussed this matter with Christopher Anderson, General Counsel/Deputy Executive Director, State Commission on Ethics, informing him of my request for written opinion.

<sup>2</sup> The City's response to this public demand has been addressed in part by its Sunset Harbour Neighborhood Improvement Project, created in order to address the area's infrastructure and above-ground improvements.

Inasmuch as, absent a conflict of interest, the Mayor is required to vote on the subject upcoming agenda item<sup>3</sup>, the issue arises of whether, under the facts provided, the Mayor has a voting conflict of interest. As explained more fully below, it is my legal opinion that a voting conflict does not exist.

## **II. Legal Issues**

The Florida Code of Ethics for Public Officers and Employees provides in relevant part:

*No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes. Section 112.3143(3)(a), Florida Statutes.*

This provision prohibits a local public officer from voting upon a measure which inures to his special private gain or loss or which he knows would inure to the special private gain or loss of a relative. Section 112.3143(1)(d), Florida Statutes, defines "special private gain or loss" as "an economic benefit or harm." This provision also clarifies that one consideration when determining whether such gain or loss would be present is "[t]he degree to which there is uncertainty at the time of the vote as to whether there would be any economic benefit or harm to the public officer [or], his or her relative . . ." This statute is consistent with the Ethics Commission's prior interpretations of the voting conflicts law, as it has consistently opined that no special private gain or loss exists in situations where any gain or loss to a public officer would be remote and speculative. See Fla. CEO opinions 05-17, 05-02, 05-03, 14-03, 91-17 and 86-44.

The Florida Ethics Commission has previously considered the specific issue of an elected official who has an interest in property adjacent to property being rezoned, and has held that absent a clear showing of "special private gain or loss" as a result of the vote (per Florida Statute Section 112.3143), the official's ownership of such property, even if adjacent to the property directly affected by the measure, does not constitute a voting conflict, finding that "...any possibility of gain from the measure would be remote and speculative, and any actual gain would not be 'special' within the meaning of the voting conflicts law":

- Fla. CEO 05-02: official had no voting conflict regarding a measure to change zoning requirements for a mobile home district as "...although zoning changes within the district could affect the local market for mobile homes and thus could affect the member's business, we find that such an effect (such gain or loss) would be 'remote and speculative. See, for example, CEO 93-7, in which we found no voting conflict, reasoning that it was remote and speculative to assume that by raising the rent at a city-owned mobile home park a city commissioner would

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<sup>3</sup> See, Fla. Stat. sec. 286.012.

be able to charge higher rent at his park. See also CEO 93-21 in which we found no voting conflict, reasoning that any benefit would be remote and speculative in a situation regarding a developer's special exception request to change the designated uses of two lots located a block apart from lots owned by a city planning and zoning commissioner and her husband”.

- Fla. CEO 05-03: “...In numerous opinions, we have opined that where the impact of a vote on the public officer's interests is uncertain at the time of the vote, the impact of the vote would be ‘remote and speculative’ and, thus, not a voting conflict. ...we do not believe that votes to enter into a contract with the developer to build the road as a four-lane road as opposed to a two-lane road, votes on the comprehensive plan to amend the description of the road, or votes on comprehensive plan and DRI applications to be submitted by the developer, would inure to the special private gain or loss of you, your relatives, or your business associates. ...The possibility that a large-scale retailer may choose to build a ‘supercenter’ on the developer's 139-acre parcel instead of the 54-acre tract which is presently under option is simply too remote and speculative to constitute a voting conflict under our precedent. See 80-3. **Moreover, there is already intense development existing and underway in the general vicinity of the developer's 139-acre parcel and, whether or not he gets the specific road and development approvals he seeks from the county, there is no indication that any of this will inure to your special private gain or loss or that of your relatives or business associates for purposes of Section 112.3143(3)(a), Florida Statutes.**”
- Fla. CEO 91-17: “A city council member is not prohibited by Section 112.3143(3), Florida Statutes, from voting on one of the road alignments being considered where the member owns property abutting the road but would not be directly affected by the proposed configuration of roads. **Although property values in the area may increase as a result of the project, any gain resulting from the project would be too remote and speculative to constitute ‘special private gain’ requiring the council member to abstain from voting.**”<sup>4</sup>
- Fla. CEO 14-03 A county commissioner is not prohibited by Section 112.3143(3)(a), Florida Statutes, from voting on measures to amend or approve a management agreement and purchase and sale agreement for a county-owned airport adjacent to property in which he has an ownership interest, as any gain or loss resulting to the commissioner would be remote and speculative.

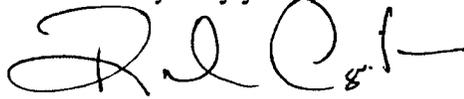
The reasoning of the above-cited opinions apply equally to the circumstances presented in this request for opinion, and it thus appears clear that any impact the proposed City legislation would have on Mayor Levine’s property in the future is too remote and speculative to constitute “special gain.” Accordingly, the Mayor would not be prohibited by Section 112.3143, Florida Statutes, from voting on the subject ordinance.

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<sup>4</sup> See footnote #9 of CEO 91-17: “Information from the County Property Appraiser's Office supplied by the member indicates that building of the road would not affect the value of the corporation's property; and the member represents to us that the Appraiser's Office stated that they did not know if or how the road would affect the value. This information buttresses our determination that any gain or loss to the member's corporation's property occasioned by votes on the road matter would be remote and speculative.” I have similarly contacted the Miami-Dade County Property Appraiser’s Office and can represent that the Appraiser’s Office confirmed the speculative nature of any effect on value of the Mayor’s property as a result of the proposed zoning ordinance.

In light of the upcoming March 9, 2016 City Commission meeting, I respectfully seek your expedited opinion on the above issue of whether the Mayor is presented with a voting conflict of interest. Subsequent to receipt of your opinion, I must opine on the related issue of compliance with the Miami-Dade County's Ethics Code, as well as ensure resolution of this issue in order to finalize the Commission's subject agenda item, and would thus request receipt of your opinion by February 29, 2016. I thank you and remain available should you wish to contact me for further discussion.

Very truly yours,

A handwritten signature in black ink, appearing to read "R. J. Aguilá", with a horizontal line extending to the right.

RAUL J. AGUILA  
CITY ATTORNEY

JO/RJA:mmm

c: Christopher Anderson, III, General Counsel  
and Deputy Executive Director ([anderson.chris@leg.state.fl.us](mailto:anderson.chris@leg.state.fl.us))

**This instrument was prepared by:**  
**Name: Graham Penn, Esq.**  
**Address: Bercow Radell & Fernandez, PA**  
**200 South Biscayne Boulevard**  
**Suite 850**  
**Miami, Florida 33131**

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**DECLARATION OF RESTRICTIONS**

THIS DECLARATION OF RESTRICTIVE COVENANTS ("Declaration"), made this \_\_\_ day of \_\_\_\_\_ 2016, by SH Owner, LLC and Sunset Land Associates, LLC, (collectively the "Owner"), in favor of the City of Miami Beach, Florida, a municipality of the State of Florida ("City").

*WHEREAS*, Owner, holds the fee simple title to the land described on the attached Exhibit "A" in Miami Beach, Florida, which is supported by the submitted attorney's opinion (the "Property"), and

*IN ORDER TO ASSURE* the City that the representations made by the Owner concerning the development of the Property will be abided by, the Owner freely, voluntarily and without duress covenants, and agrees to this Declaration of Restrictions covering and running with the Property as a covenant, and shall be applicable to and regulate uses and structures on the Property and be binding upon the Owners of the Property. Whenever the word "Owner" is used herein such provision shall refer to all persons and entities with rights of use or any interest in the Property and their heirs, successors in interest and/or assigns, and includes, but is not limited to, tenants of the Owner. No person or entity shall use or engage in activity on the Property contrary to the terms of this Declaration.

- (1) The recitals and findings set forth in the preamble of this Declaration are hereby adopted by reference thereto and incorporated herein as if fully set forth in this Section.
- (2) The Owner will file application(s) for and diligently seek Development Review Board approvals for a mixed-use development substantially similar to that depicted on the plans entitled "Sunset Harbour Architectural Concept Design February 11, 2016" prepared by DOMO Architecture and Design (hereinafter known as the "Project"). The Owner acknowledges that the City's Development Review Boards may require changes to the design. Unless additional land is incorporated into the Property, the floor area of the

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Project shall not exceed that depicted on the above-referenced plans. The height of any development on the Property shall not exceed that depicted on the above-referenced plans.

- (3) Following Development Review Board approvals for the Project, modifications to the Project may be approved by the Director of the City's Planning Department, provided the Director finds that the modification is in compliance with the City Code. Should the Director withhold such approval, the then Owner shall be permitted to seek such modification by application to modify the plan at public hearing before the appropriate Development Review Board or the City Commission of Miami Beach, Florida, (whichever by law has jurisdiction over such matters). Such application shall be in addition to all other required approvals necessary for the modification sought. Proposed modifications to the Property's use, operation, physical condition or site plan shall also be required to return to the appropriate development review board or boards for consideration of the effect on prior approvals and the affirmation, modification or release of previously issued approvals or imposed conditions.
- (4) **Covenant Running with the Land.** This Declaration on the part of the Owner shall constitute a covenant running with the land and shall be recorded, at Owner's expense, in the public records of Miami-Dade County, Florida and shall remain in full force and effect and be binding upon the undersigned Owner, and its heirs, successors and assigns until such time as the same is modified or released as provided for herein. These restrictions during their lifetime shall be for the benefit of, and limitation upon, all present and future owners of the real property.
- (5) **Term.** This Declaration is to run with the land and shall be binding on all parties and all persons claiming under it for a period of thirty (30) years from the date this Declaration is recorded, after which time it shall be extended automatically for successive periods of ten (10) years each, unless an instrument signed by the then owner(s) of the Property has been recorded agreeing to change the covenant in whole, or in part.
- (6) **Modification, Amendment, Release.** This Declaration of Restrictions may be modified, amended or released as to the land herein described, or any portion thereof, by a written instrument executed by the then owner(s) of all of the Property, including joinders of all mortgagees, if any, providing that same has been approved by the City of Miami Beach City Commission, or such other board with jurisdiction over the matter, at a public hearing, which public hearing shall be applied for by and at the expense of the owners. Should this instrument be so modified, amended or released, the City Manager, or his



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